IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and all other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

—v.—

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

MELVIN L. WULF
BURT NEUBORNE
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
Attorneys for Amicus Curiae

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MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amicus respectfully moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the within brief *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for respondents have declined to consent.

The American Civil Liberties Union is a nationwide membership organization dedicated to perserving rights guaranteed by the United States Constitution. Since its establishment in 1920, the ACLU has been deeply involved in exploring the meaning and scope of procedural due process of law and has appeared in literally hundreds of cases in this Court involving construction of the due process clause.

In addition, since the adoption of Rule 23 of the Federal Rules of Civil Procedure, the ACLU has consistently utilized class actions as an effective device in the protection of constitutional rights. Since the decision below presents the application of the due process clause to the evolving body of law under Rule 23 F.R.C.P. and threatens the viability of class actions as an effective remedial device, we respectfully submit the within brief *amicus curiae* in the expectation that the Court will find it of assistance in the resolution of the constitutional issue raised herein.

Respectfully submitted,

MELVIN L. WULF
BURT NEUBORNE
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
Attorneys for Amicus Curiae

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Interest of *Amicus*

The interest of *amicus* appears from the foregoing motion.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 479 F.2d 1005.

Constitutional and Statutory Provisions Involved

This case involves the relationship between Rule 23 of the Federal Rules of Civil Procedure and the Due Process clause of the Fifth Amendment to the United States Constitution.

Statement of the Case

This proceeding, commenced in May, 1966, is an attempt to invoke the provisions of the nation's anti-trust laws against allegedly unlawful brokerage practices in connection with the transfer of "odd-lot" * parcels of stock on the New York Stock Exchange from 1962-1966.

Since the number of affected purchasers and sellers of odd-lot parcels exceeds 6,000,000 and since the average pecuniary loss to each is estimated at $1.30, resort to individual actions to redress the alleged anti-trust violations would be neither practical nor effective. Accordingly, plaintiff sought to prosecute his action pursuant to the newly liberalized provisions of Rule 23, as a class action within the meaning of Rule 23(b)(3).

The District Court, confronted with a proposed class of approximately 6,000,000 members, evolved the following notice provisions:**

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* "Odd-lots" are parcels of stock containing fewer than 100 shares.

** After a preliminary hearing on the merits, Judge Tyler assessed 90 per cent of the cost of notice against defendants, based upon his finding that plaintiff was extremely likely to prevail on the merits. 54 FRD 565.

(a) individual, actual notice to those class members involved in ten or more transactions;

(b) individual, actual notice to 5,000 randomly selected class members;

(c) notice by publication in leading financial newspapers directed to the remaining members of the class.

Defendants-Respondents objected to Judge Tyler's proposed notice provisions on the ground that they were unfair to those members of the plaintiff class who might wish to pursue their claims individually. The panel below accepted respondents' assertions and ruled that class action status must be denied herein unless and until plaintiff provides actual notice of the pendency of this action to the over 2,000,000 identifiable members of the plaintiff class. Thus, one basic issue raised herein is the nature of the notice required under Rule 23 and the Due Process Clause as a precondition to the grant of class action status.

Questions Presented

1. Do Respondents possess standing to assert the alleged right of absent class members to actual notice of the pendency of this action?

2. Assuming that the adequacy of the District Court's notice provisions is properly before the Court, do they satisfy the Due Process Clause of the Fifth Amendment?

ARGUMENT

I.

Respondents lack standing to assert the due process rights of members of the plaintiff class.

Respondents, in urging that class action status be denied because of inadequate notice to members of the plaintiff class, have appointed themselves guardians of the due process rights of those who may wish to sue them and, with the concurrence of the panel below, have successfully parlayed their role as guardians of the due process clause into a *de facto* defense against liability to the very persons whose constitutional interests they purport to protect. Of course, the practice of asserting an absent third party's theoretical constitutional rights to his or her practical detriment is not unknown to this Court.

In *Lochner* v. *New York,* 198 U.S. 45 (1905), an employer who had been convicted under a New York statute regulating maximum hours of employment successfully urged reversal of his conviction on the ground that New York's statute violated the constitutional rights of his employees to work longer hours.

In *Coppage* v. *Kansas,* 236 U.S. 1 (1915), an employer who had been convicted under a Kansas statute outlawing "yellow dog" contracts successfully urged reversal of his conviction on the ground that Kansas' statute violated the constitutional rights of his employees to set their own terms and conditions of employment. See also, *Adair* v. *United States,* 208 U.S. 161 (1908).

In *Morehead* v. *New York ex rel. Tipaldo,* 298 U.S. 587 (1936), an employer who had been convicted under a New York statute regulating minimum wages successfully urged reversal of his conviction on the ground that New York's statute violated the constitutional rights of his employees to agree to work for less than the prescribed minimum. See also, *Adkins* v. *Children's Hospital,* 261 U.S. 525 (1923); *Murphy* v. *Sardell,* 269 U.S. 530 (1925).

Unfortunately, despite the fact that the *Lochner-Coppage-Morehead* line of authority purported to protect the constitutional rights of absent third parties, the task of articulating and defending those rights was entrusted, in each case, to a "guardian" whose interests conflicted with those of the absent third parties, without any consideration of his standing to assert their rights. Compare, *Carmichael* v. *Southern Coal & Coke Co.,* 301 U.S. 495, 513 (1937).

Nor has the practice of asserting third parties' rights to their detriment abated with the demise of the *Lochner-Coppage-Morehead* line of authority. For example, in *Washington* v. *Fox,* No. 73-653, this Court is confronted with the spectacle of a migrant camp owner arguing that access for union organizers to his migrant camp would violate the ". . . right to privacy of the migrant worker . . ." Petition for certiorari, *Washington* v. *Fox,* 73-653 at p. 9.

In the instant case, respondents similarly attempt to "protect" absent third parties to their practical detriment. Respondents argue that class action status—the only practical vehicle available for testing the legality of their allegedly unlawful practices—is unavailable because all members of the plaintiff class possess a constitutional

right to actual notice of the pendency of this action and that, unless and until petitioner satisfies that Herculean notice requirement, it would be unfair to members of the plaintiff class to proceed as a class action. *Amicus* respectfully suggests that before permitting respondents to defeat class action status herein by asserting the alleged constitutional rights of absent third parties, this Court should examine respondents' standing to do so.

In recent years, this Court has limited attempts by defendants to avoid liability by asserting the constitutional rights of third parties. E.g., *Broadrick* v. *Oklahoma*, —— U.S. ——, 37 L. Ed.2d 830 (1973), *United States* v. *Raines*, 362 U.S. 17 (1960). Even where the defendant and the third party whose rights he seeks to assert share a basic community of interest, this Court has been extremely reluctant to entertain claims which focus more on the hypothetical rights of third parties than on the rights and liabilities of the parties actually before the Court. Where, as here, the defendants-respondents' interests are in basic conflict with those of the plaintiff class, it would defy precedent to permit respondents to assert the alleged due process rights of absent plaintiffs to defeat the only effective procedure available to the plaintiff class to secure redress. The analogy to *Lochner* and its progeny is too plain to ignore.

Mr. Justice White noted in *Broadrick* that judicial reluctance to entertain claims based upon the rights of third parties reflects more than judicial hypertechnicality. Rather it is premised on at least two basic policies which the standing doctrine is designed to promote: 1) the avoidance of unnecessary constitutional adjudication and 2) the assurance of proper presentation of the facts and law. Both policies would be violated by permitting respondents

to defeat class action status by asserting the alleged rights of members of the plaintiff class.

First, whatever the outcome of this litigation, it is highly unlikely that any member of the plaintiff class will actually contest his or her inclusion within the plaintiff class. Therefore, it may well never become necessary to test the constitutional sufficiency of the District Court's notice provisions.

If plaintiffs are victorious,[1] members of the plaintiff class would not be likely to contest their right to participate in a recovery. If plaintiffs do not prevail, a member of the plaintiff class would be likely to challenge his inclusion in the plaintiff class only if 1) he possessed a sufficient personal stake to warrant the expense of an additional lawsuit; 2) he believed his claims to be sufficiently strong to outweigh the *stare decisis,* and perhaps collateral estoppel, impact of an adverse holding in an identical case; and 3) he had not received actual notice of the prior action.

Whatever the likelihood of such a subsequent challenge, it would seem to be the more appropriate judicial setting in which to explore the constitutional rights of absent members of the plaintiff class to actual notice herein.[2] Unless and until such a challenge is posed in the context of a concrete factual setting by a disgruntled member of the plaintiff class, it would be an unwarranted departure from

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[1] After a preliminary investigation of the merits, the trial court appeared to believe that plaintiffs were extremely likely to prevail on the merits. 54 FRD 565.

[2] If, in such a subsequent proceeding, the Court were to uphold the constitutional sufficiency of the notice provisions, the plaintiff would, of course, be barred by *res judicata.* If the Court were to rule them constitutionally defective, the plaintiff would be permitted to go forward, burdened only by the *stare decisis* effect of the prior adjudication.

traditional practice for this Court to unnecessarily decide a complex and difficult constitutional issue which may well never be presented for decision.

Second, the heart of the standing doctrine has been a judicial assumption that the enlightened self interest of adverse parties will result in a thorough ventilation of all relevant facts and law, thereby permitting courts to make a decision on the best possible record. However, where, as here, the enlightened self interest of one party is arguably in conflict with the best interests of the absent third parties whose rights he seeks to assert, the standing model breaks down, since one can expect a party to ventilate only those facts and theories which advance his own interests. Not surprisingly, therefore, nowhere in respondents' papers is any consideration given to the non-existence of alternative vehicles for recovery should class action status be denied. Nor do respondents address themselves either to the likelihood of members of the plaintiff class asserting, or even wishing to assert, their own rights; or to what procedure would serve the best interests of the members of the class. If the constitutional rights of third parties are to be determined in their absence, surely the spokesman for the absent third parties should not be one with whom their interests directly conflict.[3]

Accordingly, *amicus* respectfully suggests that the constitutional sufficiency of the notice ordered by Judge Tyler is not appropriately before this Court, first, because respondents lack standing to contest it and, second, because it is not ripe for judicial consideration.

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[3] Thus, *amicus* suggests that should a District Court wish to consider the due process rights of absent members of the plaintiff class, it should consider appointing a "special guardian" to articulate their best interests.

II.

The notice prescribed by the District Court satisfied the requirements of the due process clause under the facts and circumstances of this case.

Amicus has urged that consideration of the due process rights of absent members of the plaintiff class be deferred until a member of the class himself seeks to raise the issue in a subsequent proceeding, or until a Court appointed special guardian—acting solely in the best interests of the class—deems it appropriate to raise the issue. However, to the extent the sufficiency of the notice directed by Judge Tyler is appropriately before the Court, we believe it satisfies the requirements of procedural due process of law under the facts and circumstances of this case.

It is, of course, a truism to note the accuracy of Mr. Justice Frankfurter's observation in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 149 (1951) that:

> ". . . 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and

stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process." 341 U.S. at 162-163.

Thus, in measuring the constitutionality of the notice procedure utilized by the District Court, one must, in Mr. Justice Frankfurter's words, identify:

> "[t]he precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged [and] the balance of hurt complained of and good accomplished . . ." 341 U.S. at 164. See also, *Hansberry* v. *Lee*, 311 U.S. 32 (1940).

Applying Mr. Justice Frankfurter's analysis to the facts of this case, it becomes necessary, first, to identify "the precise nature of the interest that [would be] adversely affected" by a failure to provide actual notice to each member of the plaintiff class. Unfortunately, the panel below failed to address itself to this issue, relying instead upon an unsupported assumption that the interest was substantial. However, an analysis of the facts and circumstances of this case reveals that the potential causes of action of individual members of the plaintiff class which might be affected by Judge Tyler's notice requirements are far from substantial. First, it appears that the statute of limitations has run on any individual claim which might be asserted by a member of the plaintiff class. Second, the

relatively small financial loss suffered by each individual class member renders it extremely unlikely that he would elect to pursue an individual, rather than a class, remedy. Finally, the tenacity with which the named plaintiff has pursued this matter demonstrates his capacity to adequately represent the interests of the class. Thus, the "interest" which may be adversely affected by the notice procedure prescribed by the District Court consists of a time-barred cause of action for a nominal sum which is already being adequately and competently pursued in a representative capacity by the named plaintiff—hardly the type of substantial interest which the due process clause has traditionally been invoked to protect. Compare, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sinderman*, 408 U.S. 593 (1972) with *Goldberg* v. *Kelley*, 397 U.S. 254 (1970).

Having identified the relatively insubstantial interest at stake, the remaining questions posed by Mr. Justice Frankfurter's analysis militate in favor of upholding the notice procedure suggested by the District Court. The obvious reasons for its adoption and the lack of any practicable alternative, together with the "balance of hurt complained of and good accomplished" establish that Judge Tyler was well within the limits of the due process clause in evolving workable procedures under which this action could go forward.

Of course, while the procedures suggested by the District Court appear to be constitutionally appropriate in the context of the facts and circumstances of this case, should the "interests adversely affected" be more substantial in future cases, it may well be necessary for District Courts to impose more stringent notice requirements to

satisfy constitutional norms. However, *amicus* respectfully suggests that the adoption of such rules should await the factual development and case by case analysis which is the traditional basis for the enunciation of constitutional doctrine.

Finally, in allocating the cost of the notice procedure on the basis of a preliminary hearing on the substantiality of plaintiffs' cause of action, Judge Tyler was well within his discretionary authority. E.g., *Ostapowicz* v. *Johnson Bronze Co.*, 54 FRD 465 (W.D. Pa. 1972); *Rothman* v. *Gould*, 52 FRD 494 (S.D.N.Y. 1971); *Feder* v. *Harrington*, 52 FRD 178, 184 (S.D.N.Y. 1970); *Berland* v. *Mack*, 48 FRD 121 (S.D.N.Y. 1969); *Dolgow* v. *Anderson*, 43 FRD 472 (E.D.N.Y. 1968). Indeed, if one could design an ideal system for administering the notice aspects of Rule 23, it would make maximum use of the experience and abilities of the nation's district judges. Judge Tyler acted in the best traditions of the federal judiciary and his orders should be reinstated.

CONCLUSION

For the reasons stated above the decision of the Court of Appeals for the Second Circuit should be reversed and the order of the District Court should be reinstated.

Respectfully submitted,

MELVIN L. WULF
BURT NEUBORNE
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
Attorneys for Amicus Curiae

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